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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 717

ALUMINUM COMPANY OF AMERICA, ET AL.,
Petitioners,

v.

WOODS EXPLORATION AND PRODUCING CO., INC. ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

BRIEF OF RESPONDENTS WOODS EXPLORATION AND PRODUCING CO., INC., SOUTHEASTERN PIPE-LINE COMPANY, BEN NOVAK AND CLAIRE BENZ-STODDARD IN OPPOSITION

PRICE DANIEL
Brown Building
Austin, Texas
Attorney for Respondent, Ben Novak

WILLIAM E. YORK.
1015 Pecan
McAllen, Texas
Attorney for Respondent, Claire Benz-Stoddard

MILLER B. WALKER, JR.
LEVERT J. ABLE
1615 South Coast Building
Houston, Texas
Attorneys for Respondents, Woods Exploration and Producing Co., Inc. and Southeastern Pipeline Company

FIDELITY PRINTING COMPANY, INC., HOUSTON

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Woods Exploration and Producing Co., Inc., Southeastern Pipeline Company, Ben Novak, and Clarie Benz-Stoddard, Respondents, respectfully submit this Brief in opposition to the Petition for Writ of Certiorari filed herein by Petitioners.

OPINIONS BELOW

The opinion of the Supreme Court of Texas in this case is correctly identified in the Petition and is copied in Appendix "D" to the Petition. Likewise, the dissenting opinion of Mr. Justice Smith, in which Mr. Justices Hamilton and Norvell joined, is correctly identified in the Petition and copied therein as Appendix "E" and the dissenting opinion of Mr. Justice Hamilton, in which Mr. Justices Smith and Norvell joined, is correctly identified in the Petition and copied in Appendix "F" thereto.

JURISDICTION

Respondents submit that this Honorable Supreme Court of the United States has no jurisdiction to review the Judgment of the Supreme Court of Texas in this cause under Section 1257 (3) of Title 28, United States Code, because:

(a) Petitioners have waited too long to make their claim that Section 12 of Article 6008, Revised Civil Statutes of Texas, is repugnant to the Constitution of the United States since such claim was first made by Petitioners in their Motion for Rehearing filed in the Supreme Court of Texas after judgment;

(b) The Judgment of the Supreme Court of Texas is not "final" within the meaning of Section 1257, Title 28, United States Code, as interpreted by this Court.

(a) Petitioners' constitutional claims not timely presented.

The basis of the Petition for Writ of Certiorari is that the decision of the Texas Supreme Court in this case holding the Railroad Commission Order in question violative of and beyond the power of the Commission under Section 12 of Article 6008, Revised Civil Statutes of Texas, construes and applies such statute so as to deny Petitioners the equal protection of the law and takes Petitioners' property rights without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. The Petitioners at no point raised their claim that such statute was repugnant to the Federal Constitution until their Motion for Rehearing filed with the Supreme Court of Texas following such Court's decision in this case. Yet Petitioners at Pages 6 and 7 of their Petition for Writ of Certiorari make the following statement:

"*The District Court* and the majority opinion of the Supreme Court of Texas construe Section 12 in their

> isolation as prohibiting the Railroad Commission of Texas from fixing a ceiling on gas reservoir production allowable in any amount less than the total amount which can be sold from the reservoir for lawful end uses even though a lower maximum ceiling was admittedly necessary to protect Petitioners' correlative rights to gas in the common reservoir from violation by Respondents and in order to prevent the confiscation of vast quantities of Petitioners' gas by Respondents through tremendous drainage of gas from under Petitioners' lands." (emphasis added)

While Respondents do not agree with all of the statements contained in this paragraph from the Petition, it does show that Petitioners correctly recognize that the Judgment of this District Court was subject to the same complaint by Petitioners as was the decision of the Supreme Court of Texas. The Judgment of the District Court held that the Commision's Order in question was invalid because violative of and beyond the powers of the Commission under Section 12 of Article 6008, Revised Civil Statutes of Texas (See copy of Judgment of District Court attached as Appendix A, Page 1-A of Petition for Writ of Certiorari). It is this same action by the Supreme Court of Texas which Petitioners claim presents the Federal Constitutional question here (See topic "Question Presented" on Page 4 of Petition for Writ of Certiorari).

In the hearing on Respondents' Motion for Summary Judgment in the trial court, Petitioners presented affidavits supporting their contentions of confiscation of their gas by the small tract wells and that the new Railroad Commission Order would reduce such confiscation (Tr. 230, 233, 239, 252). The trial court granted Respondents' Motion for Summary Judgment (Tr. 288). Under Texas law the trial court, in considering a motion for summary judgment, views the facts together with every reasonable inference deductible

therefrom in the light most favorable to the party opposing the motion. *Womack* v. *Allstate Insurance Co.*, 296 S.W. 2d 233 (Tex. Sup. 1956). Also under Texas law the Appellate Court in reviewing a summary judgment against a party will assume his affidavits in opposition thereto to be true. *Cowden* v. *Bell*, 300 S.W. 2d 286 (Tex. Sup. 1957). Thus Petitioners' statement on Page 19 of their Petition that until the Opinion of the Supreme Court there had been no fact finding of confiscation is incorrect.

In the light of the above, Respondents submit that Petitioners have wholly failed to properly present their constitutional claims in such a manner as to be considered by the Supreme Court of the United States, and having so failed to present such claims this Honorable Court has no jurisdiction to now consider them. *Bowe* v. *Scott*, 233 U.S. 658 (1914). It is well established that the United States Supreme Court will not consider constitutional claims first presented on a motion for rehearing in the state court of last resort when such court does not decide such claims. *Radio Station WOW* v. *Johnson*, 326 U.S. 120 (1945); *Herndon* v. *State of Georgia*, 295 U.S. 441 (1935); *Chicago, I. & L. Ry. Co.* v. *McGuire*, 196 U.S. 128 (1905). In fact, it has even been held that, if a United States constitutional claim first arises as a result of the decision of the court of last resort, it is too late to make the constitutional claim on the motion for rehearing in that court if the action of the court could have been anticipated. See *Herndon* v. *State of Georgia, supra.* However, despite Petitioners' tortuous reasoning to the contrary, the constitutional claim here presented by the Petitioners could have been presented at the Motion for Summary Judgment stage in the trial court or, certainly at the latest, on their appeal to the Supreme Court of Texas. The Supreme Court of Texas in its majority opinion stated that the question to be decided "is whether the Commission

may, for the purpose of protecting correlative rights, establish a ceiling on the monthly allowable of gas to be produced from a reservoir." This is necessarily the same question decided by the trial judge when he held that such was not within the statutory authority of the Railroad Commission. As shown above, his decision was rendered with the assumption that the drainage as alleged by Petitioners did in fact exist. He further made such decision in the face of the undisputed fact that the purpose of the Commission's new Order was to protect correlative rights since this was shown by Petitioners' affidavit and is in fact recited in the Order itself as its purpose. (Tr. 72-75).

In summary Respondents would point out that no discussion of any constitutional issue now attempted to be raised by Petitioners is to be found in the opinion of the Texas Supreme Court. No attempt to raise any such constitutional issues was made by Petitioners prior to their Motion for Rehearing filed in the Texas Supreme Court. No opinion was rendered by the Texas Supreme Court in its Order dated July 27th, 1966, overruling Petitioners' Motion for Rehearing. Because of these facts Respondents respectfully submit that this Court has no jurisdiction to grant the Petition for Writ of Certiorari because of the rule established by such cases as *Bowe* v. *Scott, supra*, where it was stated:

> "It is further urged that, * * *, there is no jurisdiction because no assertion of rights under the Constitution was made below until the petition for rehearing, which was too late, and the tardiness of which was not saved by the action of the court, since it simply declined to grant the rehearing without deciding the questions presented as the basis of the request for rehearing. As it is elementary that a mere assertion in a state court of a right under the Constitution of the United States in a petition for rehearing affords no

> ground for invoking the jurisdiction of this court unless the court below, in dealing with the petition for rehearing, considers and passes upon the Federal ground therein relied upon, we dismiss that subject from view * * *" Page 771

(b) The Judgment of Supreme Court of Texas not final.

It is settled law in Texas that the courts are not empowered to write an order for the Railroad Commission. As was stated in *Halbouty* v. *Railroad Commission*, 357 S.W. 2d 364 (Tex. Sup. 1962):

> "All parties, of course, concede that the court is not empowered to direct the Commission as to the nature or terms of its order or what weight should be given to the several allowed factors. We are limited to passing upon the validity of the order as promulgated." Page 573-574.

In the instant case the majority opinion of the Supreme Court of Texas stated:

> "We do not mean to suggest that reasonable market demand must always be fixed at the mathematical total of the producer's forecast for the month. Use of these nominations is merely an administrative device, and the Commission may consider and give appropriate weight to all facts that are relevant to the determination of reasonable market demand. (See page 17-A of Appendix to Petition.)"

All the Supreme Court of Texas has done in this case is to strike down the new procedure for setting reservoir allowables because it set an arbitrary limit on reasonable market demand based upon factors having nothing to do with reasonable market demand. The effect of the decision of the Texas Supreme Court is to send this controversy back to the Railroad Commission for a new and proper

order within the statutory limits as established by the Legislature. Thus Petitioners' complaint is not with what the Supreme Court of Texas has done but with what the Railroad Commission of Texas may do, and thus is premature. See *Hunter Co.* v. *McHugh*, 320 U.S. 222 (1943); *Republic Natural Gas Co.* v. *State of Oklahoma*, 334 U.S. 62 (1948). This Court stated in *Hunter Co.* v. *McHugh*, *supra*:

> "In the present posture of the record, so far as the appeal seeks to bring before us for review the judgment of the state court sustaining the constitutionality of the statute, the record presents no substantial federal question. * * * On this appeal, absent from the record any operative order implementing Act No. 157, we cannot say that the application of the Act can be enjoined as invalid on its face, for we cannot say that no order could be made by the Commissioner which would apportion the production and distribute the costs of production and of the apportionment in a manner which would be consonant both with the requirements of the statute and the Federal Constitution * * * It will be time enough to consider the constitutionality of any particular apportionment and distribution of costs when we have before us the specific provisions of an order directing them which has been subjected to the scrutiny of the state court." Page 228.

In their Petition the Petitioners attempted to construe much of the language in the Opinion of the Supreme Court of Texas and emphasized certain language which was not necessary to the Court's judgment. This Court has held that it reviews judgments, not statements and opinions. *Black* v. *Cutter Laboratories*, 351 U.S. 292 (1956); *Hurb* v. *Pitcairn*, 324 U.S. 117 (1945). In *Hurb* v. *Pitcairn*, *supra*, this Court stated:

> "This Court from its foundation has adhered to the principle that it will not review judgments of the state

courts that rest on adequate and independent state grounds. * * * Our only power over state judgments is to correct them to the extent they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its view of federal laws, our review could amount to nothing more than an advisory opinion." Page 125-126

There is, of course, no Federal question involved insofar as whether or not the Legislature has delegated particular powers to the Railroad Commission. *State of Minnesota* v. *Probate Court,* 309 U.S. 270 (1948).

STATEMENT OF THE CASE

Respondents, in their argument under "JURISDICTION", *supra,* point out in what respects they differ with that portion of Petitioners' STATEMENT OF THE CASE relative to the question of whether or not Petitioners have timely made their constitutional claims and have also included there pertinent facts relative to this question of jurisdiction which are omitted from Petitioners' STATEMENT OF THE CASE. Therefore, Respondents' Statement of the Case will be confined to facts relative to the merits of Petitioners' alleged constitutional question presented.

Benz-Stoddard v. *Aluminum Company of America,* 368 S.W. 2d 94 (Tex. Sup. 1963), discussed on Pages 8 and 9 of the Petition, did hold that because the applicable Texas Statutes authorized the Railroad Commission to treat a completion in each reservoir as one well, the Respondent Benz-Stoddard was entitled to a completion in each reservoir. But Petitioners fail to point out here that the Supreme Court of Texas held that Benz-Stoddard was entitled to a

completion in each reservoir in order to prevent confiscation of the gas underlying her land in each of the reservoirs in which a completion was allowed. The Court stated:

> "We hold, therefore, that since the Commission is authorized to treat each completion in a separate reservoir as a separate well, it may grant multiple completions in each reservoir in which it finds there will be confiscation. The allegation that under the existing proration order Petitioner will recover more gas from her land through one completion than underlies her land in all the reservoirs does not amount to a denial of the presumed finding by the Commission that there will be confiscation in each reservoir." Page 368

On Page 11 of Petitioners' Petition they assert that in *Railroad Commission* v. *Aluminum Company of America*, 380 S.W. 2d 599 (Tex. Sup. 1964), the Supreme Court of Texas held that Petitioners were precluded by "lapse of time" from attacking the ⅓-⅔ allocation formula in effect in Appling Field. The opinion of the Supreme Court in that case dealt with considerably more than Petitioners' lapse of time in attacking the allocation formula. On Page 603 of the opinion the Court pointed out that at the time of the first allocation formula in 1956 five wells have been drilled on small tracts, but that by 1959 thirty small tract (Rule 37 exceptions) wells had been completed in the Field and it was not until this time that Alcoa first took any action to set aside the allocation formula claiming it was confiscatory. The Court also points out on page 603 of its opinion that the cost of the thirty wells ranged from $90,000.00 to $200,000.00 each. The Court further found that in 1956 Alcoa had sufficient information available to them to conclude that many of the town lots lay within the then proven territory, and that as a matter of law, Alcoa knew that these town lots would be entitled to Rule

37 exception permits. The Court also took note of the fact that Alcoa and its associates had refused offers to pool or unitize from some small tract owners and that several of these small tract owners' gas was being drained by the surrounding five wells belonging to Alcoa. Additionally, on page 604 of the opinion the Court stated:

> "There are many reasons why stability in respect to proration formulas is vital to the well-being of the industry as a whole, to the property owners in the field and to the public at large. It is a matter of common knowledge that well owners are not alone concerned. Individuals and institutions have invested in royalties and in other oil and gas interests. Loans have been made with these properties as security, and taxes have been levied by various municipal and school authorities. It is well known that the economy of the whole State rests to a large extent on the oil and gas business." Page 604

Thus it can be seen that it was not, as Petitioners would have this Honorable Court believe, mere lapse of time on their part in attacking the allocation formula which led the Supreme Court of Texas to uphold the validity of such formula. Rather to a very large extent the Judgment of the Court was based upon weighty equities existing in favor of the small tract owners.

Petitioners have again, as they did in their Briefs in the Supreme Court of Texas, devoted much space to citing the evils of well bore communication between reservoirs in an attempt to justify the arbitrary market demand order when the effect of such well bore communication has been eliminated in another separate Railroad Commission proceeding which had nothing to do with market demand. The Railroad Commission has merged and consolidated all the Appling Field sands in which well bore communications have been alleged. (Oil & Gas Docket No. 2-53,786 and No. 2-54,578,

Order dated August 10, 1965). Petitioners did not deny this when brought to the attention of the Supreme Court of Texas and this Court is entitled to take judicial knowledge of this fact. In fact, Petitioners admitted it in their Reply Brief filed after oral argument in the Supreme Court of Texas (See Pages 9-11 thereof). The point is that the proceeding for determination of market demand is not a proper place to eliminate any evils which may result from well bore communications — that the latter is not relevant to a determination of reasonable market demand. No loss to any one now exists by natural or artificial well bore communications. Under the merger, there is only one allowable to each well, no matter how many multiple completions were made. Petitioners may accuse us of going outside the record on this subject, but this Court is entitled to know that any attempt to base constitutional questions on well bore communications is without merit.

The normal procedure for determining market demand is based upon nominations or producers' forecasts of operators in the field limited by their ability to produce. This procedure has been in effect in one form or another since the inception of the Appling Field, and is set out as an attachment of the Motion for Summary Judgment filed by Respondents in the trial court (Tr. 70-71).

In reply to Respondents' Request for Admissions, filed prior to the trial in the District Court, the following was undisputed (Tr. 272-278):

(1) Sections (c) and (e) of the Commission's Statewide Rule 31 governs the normal manner in which reasonable market demand, and hence the total monthly gas allowable for each individual gas reservoir is determined. The primary basis for this normal determination is the total of the producers' forecast filed by the operators having wells

completed in each reservoir stating the volume of gas each producer expects to be able to market the following month from each of his wells.

(2) The normal procedure set forth above has been followed generally in the non-associated gas reservoirs of the State for many years, and is still followed in the remaining reservoirs of the Appling Fields, except for such reservoirs as were subject to the Order held invalid by the Supreme Court of Texas.

(12) The present instance is the first time that the amended procedure has been used by the Railroad Commission of Texas.

On Page 12 of their Petition, Petitioners state that since the decision in *Railroad Commission* v. *Aluminum Company of America* in 1964, confiscation of their gas has been increased as a result of well bore communications. However, the opinion of the Texas Supreme Court in this case states that:

> "A 1961 study disclosed that drainage was taking place from the Middle Kopnicky to the smaller upper zone sands through well bore communication in the wells with multiple completions." (See Page 9-A of Appendix to Petition)

Also one of Petitioners' own affidavits, copy of which is attached to their Petition, states that commencing in 1961 the Commission first tested for well bore communication and that such well bore communication between reservoirs has been a continuing problem in the Appling Field (See Pages 53-A and 54-A of Petition).

Lest the Court think that Respondents are making much ado about unsubstantial results from the Railroad Commission's new procedure for setting reservoir allowable,

it is felt that an example of the result to Respondents should be pointed out. Under this new procedure Respondent Woods Exploration and Producing Co., Inc.'s production in the Appling Field has been reduced to a mere fraction of what it was under the prior procedure. As is shown by Attachment "B" to the Affidavit of Robert E. Parris, an expert on gas proration, under this amended procedure for determining market demand in December, 1964, Aluminum Company of America lost 3.2% of their customary allowable and Respondent Woods lost 93.4% of their customary allowable which would have been received under the prior Commission procedure (Tr. 97).

RESPONDENTS' REPLY TO PETITIONERS' REASONS FOR GRANTING THE WRIT

I.

Petitioners, and others like them claiming confiscation of oil and/or gas from under their property, are furnished under the applicable Texas statutes an adequate remedy but Petitioners, because of the equities in favor of others in the Appling Field and because of their own laches, have been barred from pursuing this remedy.

Railroad Commission Rule 5, the proration formula in Appling Field by which the monthly allowable is allocated to the various wells in the Field, provides as follows:

> "RULE 5. The daily allowable production of gas from individual wells completed in a non-associated gas reservoir of the subject field shall be determined by allocating the allowable production *after deductions have been made for wells which are incapable of producing their gas allowables,* among the individual wells in the following manner:
>
> (1) Two-thirds (⅔) of the allowed gas production from a non-associated gas reservoir shall be allocated

to the individual wells completed therein in that proportion that the acreage assigned to each well bears to the sum of the acreage of the reservoir.

(2) One-third (⅓) of the allowed gas production from a non-associated gas reservoir shall be allocated equally among the individual wells completed therein.

(3) The total daily non-associated gas allowable for each well shall be the sum of its acreage and per well allowable." (emphasis added)

It can be seen that it is this proration formula which contains the provision whereby the excess allowable which is assigned to Petitioners' wells and which they are not capable of producing is re-assigned to other wells in the field. It is this reassignment of allowables which Petitioners cannot produce of which they complain. The sole purpose of the amended procedure for determining field allowable in the Appling Field was to eliminate or render negligible any allowable which could be so reassigned.

Recognizing their remedy for claimed confiscation a suit was brought by some of the Petitioners herein and others to set aside and have declared invalid the proration formula in Appling Field. In *Railroad Commission* v. *Aluminum Company of America et al.* 380 S.W. 2d. 599 (Tex. Sup. 1964), the Texas Supreme Court held the Commission's Rule 5 to be valid because of Aluminum Company of America, et al's unreasonable delay in seeking to have it set aside. The Court first referred to its dictum in a prior case to the effect that "where producers have acquiesced in and failed to complain of the Commission's proration orders for a long period, during which time other operators have expended vast sums in exploration and drilling operations, such producers should not be heard to complain."

The Court further stated in that Opinion that:

> "There are many reasons why stability in respect to proration formulas is vital to the well-being of the industry as a whole, to the property owners in the field and to the public at large. It is a matter of common knowledge that well owners are not alone concerned. Individuals and institutions have invested in royalties and in other oil and gas interests. Loans have been made with these properties as security, and taxes have been levied by various municipal and school authorities. It is well known that the economy of the whole State rests to a large extent on the oil and gas business." Page 604

In their Petition for Writ of Certiorari, Petitioners, while asserting that *Railroad Commission* v. *Aluminum Company of America, et al, supra,* works a grave injustice upon them, have neglected to tell the Court that in the Appling Field (1) the small tract owners attempted to pool and unitize their tracts with Aluminum Company of America and were refused, (2) Petitioners had these small tracts surrounded by four or five wells and were draining the gas from under the small tracts and not paying the small tract owners anything, (3) Petitioners in 1956 knew that in all probability the Railroad Commission would give relief to the small tract owners by granting them Rule 37 permits to drill their tracts under the circumstances, and (4) the fact is, Petitioners waited over four years to complain of the ⅓-⅔ proration formula and until over thirty wells were drilled on the small tracts under Rule 37 permits, which wells cost between $90,000 and $200,000 each. See *Railroad Commission* v. *Aluminum Company of America, supra,* at Pages 603 and 604. In view of these equities existing in favor of the small tract owners, the Supreme Court of Texas held in that case that Petitioners had waited too long to complain of the proration formula. This decision was not contrary to the

earlier cases of *Atlantic Refining Co.* v. *Railroad Commission,* 346 S.W. 2d 801 (Tex. Sup. 1961), and *Halbouty* v. *Railroad Commission,* 357 S.W. 2d 364 (Tex. Sup. 1962, writ of cert. denied, 371 U.S. 883), both of which held invalid ⅓-⅔ proration formulas in other fields, because both of those cases excepted such a fact situation as exists in the Appling Field from the effect of the holdings therein. For example, in *Atlantic Refining Co.* v. *Railroad Commission, supra,* the Court stated:

> "We are in agreement • • • that where producers have acquiesced in and have failed to complain of the Commission's proration orders for a long period, during which time other operators have expended vast sums in exploration and drilling operations, such producers should not be heard to complain." Page 811

And in *Halbouty* v. *Railroad Commission,* 357 S.W. 2d 364 (Tex. Sup. 1962), the Court stated:

> "This does not mean and we are not to be understood as foreclosing the power of the Commission, by proper order or exception, to allow the holder of a Rule 37 permit to recover a sufficient amount of oil or gas to repay drilling and production costs and provide a reasonable profit when no other means of recovering the minerals which underlie his land are available. No such problem is before us." Page 376

In *Railroad Commission* v. *Shell Oil Co.,* 380 S.W. 2d 556 (Tex. Sup. 1964), cited by Petitioners and decided the same day as *Railroad Commission* v. *Aluminum Company of America, supra,* the Texas Supreme Court held invalid a ⅓-⅔ proration formula in another field because the equities as above set out existing in favor of the small tract owners were not present in the field involved in that case.

The Supreme Court of Texas has, prior to this date, recognized that under the applicable oil and gas statutes of this State the Legislature has provided that proration of the field or reservoir, allowable among the wells is the method whereby correlative rights can be protected. For instance in *Atlantic Refining Co.* v. *Railroad Commission*, 346 S.W. 2d 801 (Tex. Sup. 1961), it was stated that:

> "The responsibility rests with the Commission to devise some rule of proration which will conserve the gas in the field in question and at the same time be fair and just to all parties without depriving any of them of his property." Page 812

The majority opinion in the instant case states that:

> "The Legislature undoubtedly contemplated that each well would receive its fair share of the gas produced, but it also specified the means by which that end is to be accomplished." (See Appendix, Page 16-A, Petition for Writ of Certiorari)

Thus under the Texas oil and gas statutes Petitioners are afforded an adequate remedy for any claimed confiscation. Certain statements in the Petition show that Petitioners recognize that it is the re-assignment of excess well allowables that their wells are incapable of producing which results in any confiscation of their gas and that their proper remedy for this situation was recourse to the Commission to secure a change in the allocation formula. For instance Petitioners state that "such excess under the Railroad Commission's field rules being assigned to the Respondents' town lot wells, thereby permitting them to drain still greater quantities of Petitioners' gas. * * * 530,000 MCFs of gas that this large tract well was unable to produce was allotted under the Commission procedure to Respondents' seventeen town lot wells, enabling them to confiscate and convert to their own use that amount of

Petitioners' gas in a single month!" (Page 13 of Petition). And again "Petitioners could not obtain relief from the pillaging of their property by petitioning the Railroad Commission for modification of the ⅓-⅔ allocation formula governing individual well allowables, e.g., converting to a straight acreage basis for a reduced percentage to the wells and an increased percentage to the acreage, because the ⅓-⅔ allocation formula had been judicially frozen against Petitioners by the Texas Supreme Court's decision in Railroad Commission v. Aluminum Company of America * * *" The fact that Petitioners through their own neglect in failing to timely pursue this remedy and the fact that certain equities existing in favor of the small tract owners in the Appling Field have resulted in this remedy being unavailable to Petitioners does not in anywise create a constitutional issue for consideration by this Honorable Court. Petitioners do not have a constitutional right to be afforded a remedy for confiscation of their gas at every step in the regulatory process as established by statute and Railroad Commission action pursuant thereto. It is sufficient that the pertinent statute, Section 12 of Article 6008, by providing that:

> "The monthly reservoir allowable shall be *allocated* among all wells entitled to produce gas therefrom so as to give each well its fair share of the gas to be produced from the reservoir * * *" (emphasis added)

secures to Petitioners a means by which to be protected from confiscation.

It is well established that a person has no constitutional right to any particular form of remedy but rather one's only guarantee under the Fourteenth Amendment is the furnishing of some effective procedure which will preserve

his substantial right to redress. In *Gibbes* v. *Zimmerman*, 290 U.S. 326 (1933) this Court stated that:

> "* * * The appellant has no property, in the constitutional sense, in any particular form of remedy; all that he is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure." Page 332

In *Hardware Dealers Mut. Fire Ins. Co. of Wisconsin* v. *Glidden Co.*, 284 U.S. 161 (1931), it was held that:

> "In the exercise of that power and to satisfy a public need, a state may choose the remedy best adapted, in the Legislative judgment, to protect the interest concerned, provided its choice is not unreasonable or arbitrary, and the procedure it adopts satisfies the constitutional requirements of reasonable notice and opportunity to be heard." Page 158

II.

Petitioners' true complaint is that under Section 12 of Article 6008 the Railroad Commission is not allowed to arbitrarily restrict market demand to protect them from the acts of private individuals and such complaint does not raise a constitutional issue.

The Petitioners are complaining of a statute, Section 12 of Article 6008, Texas Revised Civil Statutes (1962), by which the Legislature of the State of Texas has delegated to the Railroad Commission the authority to fix the monthly reservoir allowable of gas to be produced from a reservoir. Petitioners complain because, as they say, under the holding of the majority opinion of the Supreme Court of Texas in this case the Legislature did not authorize production from a reservoir to be limited to less than reasonable market demand, except for the prevention of waste, and that the protection of correlative rights cannot be used by the Commission to set an arbitrary maximum limit

on reasonable market demand. Yet, if the Commission had not been delegated by the Legislature the power and authority to set reservoir allowable, any drainage suffered by Petitioners would be equal to or worse than what it was under the former method of setting reservoir allowable, Statewide Rule 31, since the wells could produce their capacity. For example, in the month of July, 1964, the total delivery capacity of the eighteen wells completed in Segment 5, 7500′, was approximately 898,000 MCFs, but the production forecasts resulted in the determination that reasonable market demand, and hence the reservoir allowable, for the month was approximately 880,000 MCFs (See Majority Opinion of the Supreme Court of Texas, Appendix D to Petition, Pages 10-A and 11-A thereof). In effect what Petitioners are contending is that Section 12 of Article 6008 denies them the equal protection of the laws and takes their property without due process of law, because under such statute the Commission is not allowed to take affirmative action, by limiting reservoir allowable, to protect Petitioners from drainage of their gas by the acts of private individuals. However, the action inhibited and the protection afforded by the first section of the Fourteenth Amendment to the Constitution of the United States applies only to action by the state and not by private individuals. See *Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1954). Any drainage suffered by Petitioners is the result of one thing and one thing only, and that is, Appling Field Rule 5 (the allocation formula) which first divides the reservoir allowable on the basis of one-third to the wells and two-thirds to acreage, and second, assigns that portion of the allowable that any well receives thereby but cannot produce because of limited capacity, to the remaining wells which under the allocation formula have not been assigned their maximum capacity.

It is submitted that Petitioners' entire argument is an exercise in sophistry because of their contention that as a result of the opinion of the Supreme Court of Texas holding that under Section 12 of Article 6008 the Commission has not been given the power to limit reasonable market demand so as to protect correlative rights, the statute results in confiscation of their property in violation of due process and equal protection clauses of the United States Constitution. This they contend in face of the fact that if the Railroad Commission had not been delegated the authority by the Legislature to set reservoir allowables, drainage of Petitioners' gas as a result of each well being able to produce its capacity would be equal to or greater than what it was under the former method of determining reasonable market demand, as pointed out above. It has been held that:

> "A statute is not invalid under the Constitution because it might have gone farther than it did, or because it may not succeed in bringing about the result that it tends to produce." *Roschen* v. *Ward,* 279 U.S. 336 (1929) Page 336

Also:

> "A state may 'direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so nonetheless but the forbidden act does not differ in kind from those that are allowed'." *Hughes* v. *Superior Court,* 339 U.S. 460 (1950) Page 468

On Page 23 of their Petition, Petitioners cite and quote from *Sterling* v. *Constantin,* 287 U.S. 378 (1932). This was a suit seeking an injunction restraining the Governor of Texas and other officials from enforcing their military or executive orders restricting the production of oil from the

plaintiff's wells. Plaintiff had previously brought suit to restrain the enforcement of orders of the Commission limiting the production of oil. After the Commission was so enjoined, the Governor issued orders to the military authorities of the State to limit the production of oil in the subject field to a certain number of barrels per day per well. The Supreme Court affirmed the District Court's issuance of an injunction restraining the action of the State officials because:

> "Plaintiff had a constitutional right to resort to the Federal Court to have the validity of the Commission's orders judicially determined. There was no exigency which justified the Governor in attempting to enforce by executive or military orders the restriction which the District Judge had restrained pending proper judicial inquiry. * * * It is also plain that there was no adequate remedy at law for the redress of the injury * * *" Page 197

The *Sterling* case also differs from the instant case in that there the plaintiff was complaining of actions of the State authorities restricting their production of oil, whereas here Petitioners are not complaining of restriction of production but are in fact contending their constitutional rights are violated because production is not restricted in order to protect them from drainage of their gas by the acts of private individuals.

Thompson v. *Consolidated Gas Utility Corp.*, 300 U.S. 55 (1936), discussed and quoted from on Pages 23 and 24 of the Petition, likewise involved an attack on an order of the Railroad Commission limiting production. Again this was not a case where the complainants contended that their constitutional rights were violated because under a state statute the administrative agency was not delegated the power to protect them in their property from the act of

private individuals. Nor were they complaining of the administrative agency's failure to restrict production but rather of its restriction of production.

Mars v. *Railroad Commission*, 177 S.W. 2d 941 (1944), discussed on Pages 25 and 26 of the Petition, did not hold at Petitioners state "that a Railroad Commission order which permitted one producer's gas to be drained and confiscated by another producer contravened the Fourteenth Amendment." This was again a case where the Commission's order did not merely allow such confiscation to take place, but rather caused it, and again by the restriction of production. As the Court there in its opinion stated the suit was brought to test the validity of the Commission's proration orders and as "a bill of equity to restrain the Commission from restricting production in the field in such a manner as to constitute a taking of plaintiff's property without due process of law." Page 943. There the complainant's production had been restricted by an order of the Commission to such an extent that numerous protective wells drilled primarily to prevent drainage of complainant's oil from the high pressure area underlying their land to low pressure areas outside their land were rendered ineffective for such purpose. The Commission's order thereunder attacked so restricted complainant's production that it considerably increased this drainage and it was undisputed that the order was not necessary to prevent waste.

In summary the primary object of gas proration is to see that the market demand for gas from the reservoir is met, and that each operator is given an equal opportunity to produce his share of this demand limited only by the proration formula or *the ability of his well to produce.* The Supreme Court of Texas in this case recognized this when

it stated after discussing how the allocation formula divides the reservoir allowable among the wells, that:

> "Subject to any inequities inherent in the allocation formula, each well thus receives its fair share of the gas produced *provided all wells are capable of producing their allowables.* A well incapable of producing the allowable that would normally be assigned to it is known as a limited capacity well." (Pages 8-A and 9-A of Appendix to Petition) (emphasis added)

There can be no doubt that the Petitioners received an assignment of their proportionate part of reservoir allowable based on the ⅓-⅔ allocation formula. They contend even this is unfair because the ⅓-⅔ allocation is in itself confiscatory, but however this may be, they have been held to be barred from attacking it. But now they contend that because their wells are incapable of producing the portion of the reservoir allowable assigned them, and because their laches have prevented them from securing an allocation of the reservoir allowable that will eliminate or substantially reduce drainage from under their land, Section 12 of Article 6008 is unconstitutional because under it the Railroad Commission is not allowed to arbitrarily limit market demand and hence reservoir allowable to the point where no more allowable is assigned to their wells than they can produce.

The Petitioners should have raised the constitutional question of drainage and applied for, Writ of Certiorari to the United States Supreme Court from the decision in the case of *Railroad Commission* v. *Aluminum Company of America, et al., supra,* if they felt there was excess drainage in the Appling Field. Having failed to do so when the point was directly in issue in the case in 1964, it is too late now, two and one-half years later, to try to raise it indirectly in a collateral case.

CONCLUSION

Petitioners throughout their Petition, in one form or another, attempt to support their position that Section 12 of Article 6008, results in confiscation of their gas because under the holding of the Supreme Court of Texas the Railroad Commission is not allowed to set an arbitrary ceiling on reservoir allowables and thus restrict them to a point that their wells will produce all or substantially all of the proportionate part of the allowables they receive under the allocation formula and there will be no excess allowables to re-assign as provided for in the allocation formula. However, Respondents submit that they have shown that Section 12 of Article 6008, insofar as it concerns the duty delegated to the Railroad Commission to set reservoir allowables, although it may not prevent drainage in some cases when those claiming such drainage have failed to properly pursue and secure the remedy provided by statute (change in allocation), it in no manner requires drainage of Petitioners' gas. Respondents contend that they have shown that the State of Texas provides an adequate remedy against drainage by the procedure provided for to allocate reservoir allowables among the wells in a reservoir in such a manner as to protect correlative rights but that Petitioners have failed to timely seek to secure a change in the allocation formula so as to substantially reduce or eliminate any drainage. This is all the State is required to do under the Constitution. Furthermore, any drainage suffered by Petitioners results not from the inability of the Commission to set an arbitrary ceiling on market demand but rather from the re-assignment of their wells' allowables which they cannot produce to other wells in the field under the provision of the allocation formula which has been adjudged to be invalid. Petitioners' true complaint is not that the Railroad Commission is required under the statutes to compel drain-

age but rather that the Commission under the statutes is not allowed to take affirmative action to so restrict reservoir allowable as to protect Petitioners from their own negligence in failing to timely assert the provided remedy.

WHEREFORE, Respondents pray that because this Honorable Court does not have jurisdiction and because Petitioners' constitutional rights have not been violated the Petition for Writ of Certiorari be denied.

Respectfully submitted,

PRICE DANIEL
810 Brown Building
Austin, Texas

Attorney for Respondent, Ben Novak

WILLIAM E. YORK
1015 Pecan
McAllen, Texas

Attorney for Respondent, Claire Benz-Stoddard

MILLER B. WALKER, JR.

LEVERT J. ABLE
1615 South Coast Building
Houston, Texas

Attorneys for Respondents, Woods Exploration and Producing Co., Inc. and Southeastern Pipeline Company

CERTIFICATE OF SERVICE

I, Levert J. Able, an attorney for Respondents Woods Exploration and Producing Co., Inc., and Southeastern Pipeline Company, depose and say that I have this day served copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari, by mailing the same by United States Certified Mail, Return Receipt Requested, postage prepaid, to the following counsel of record for Petitioners in said cause:

Honorable Leroy Jeffers
Honorable James E. Allison, Jr.
Honorable Richard P. Keeton,
First City National Bank Building
Houston, Texas 77002

Levert J. Able

SUBSCRIBED AND SWORN To before me on this the 17th day of November, A.D. 1966.

J. Brunson

Notary Public in and for
Harris County, Texas